BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION

RUPERTA M. DIAZ	)	
Claimant	)	
VS.	)	
	)	Docket No. 169,533
BEECH AIRCRAFT CORPORATION	)	
Respondent	)	
Self-Insured	)	
AND	)	
	)	
KANSAS WORKERS COMPENSATION FUND	)	

ORDER

This matter comes before the Appeals Board pursuant to an order of remand from an unpublished Memorandum Opinion of the Kansas Court of Appeals, Docket No. 73,999 (December 8, 1995).

APPEARANCES

Respondent, a qualified self-insured, appeared by its attorney, Terry J. Torline, of Wichita, Kansas. The Kansas Workers Compensation Fund appeared by its attorney, Michael D. Streit, of Overland Park, Kansas.

RECORD AND STIPULATIONS

The Appeals Board considered the record and adopted the stipulations listed in the January 25, 1995, Award by Administrative Law Judge Shannon S. Krysl.

ISSUES

An appeal was taken to the Kansas Court of Appeals by the respondent from the Appeals Board's March 31, 1995, Order. The sole issue raised by that appeal concerned the liability of the Kansas Workers Compensation Fund (Fund). In its unpublished opinion, the Court of Appeals remanded this case to the Appeals Board with instructions "to make the necessary findings consistent with this opinion." The reconsideration of the Fund's liability is the only issue before the Appeals Board.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Having reviewed the entire record and considered the briefs and arguments of the parties, the Appeals Board finds the Fund should not be liable for any portion of the Award.

This single-docketed claim involves injury to claimant's bilateral upper extremities and shoulder. The Administrative Law Judge found claimant had a single whole body injury and not two separate injuries. In keeping with the bright line rule announced by the Kansas Court of Appeals in Berry v. Boeing Military Airplanes, 20 Kan. App. 2d 220, 885 P.2d 1261 (1994), as modified in Condon v. The Boeing Co., 21 Kan. App. 2d 580, 903 P.2d 775 (1995), the Appeals Board affirmed that finding by the Administrative Law Judge and ruled claimant's date of injury in this case to be July 30, 1992, claimant's last day of work.

The Administrative Law Judge apportioned liability between respondent and the Fund employing a formula which utilized the percentage of functional impairment to the claimant's left upper extremity as it related to the claimant's overall functional impairment and percentage of work disability. This was done because claimant first manifested symptoms in her left upper extremity which she then protected and, consequently, developed problems on the right. The Administrative Law Judge found that claimant would not have developed the impairment on the right but for her left carpel tunnel syndrome. Furthermore, claimant would not have any work disability but for the overuse problem that developed on the right.

By its Order of March 31, 1995, the Appeals Board modified the apportionment of liability between respondent and the Fund. The Appeals Board found claimant first manifested symptoms in her left upper extremity but did not find, from the evidence, all of the claimant's injuries and resulting disability on the right would not have occurred but for the preexisting impairment on the left. Claimant suffers from repetitive use injury to her upper extremities and shoulder, but she also suffered single traumatic events injury to her right and left upper extremities. Claimant suffered aggravation to both upper extremities as a result of mini-traumas each and every working day. These mini-traumas occurred between the dates of the two single traumatic events and thereafter continued until her last day of work on July 30, 1992.

In view of this mechanism of injury, the Appeals Board found the mathematical formula employed by the Administrative Law Judge did not fully take into consideration what should be the responsibility of the respondent with regard to the overall injury and work disability. The Appeals Board found that to assess respondent with only liability for the functional impairment to her left upper extremity would understate the significance of that impairment to the overall work disability. The Appeals Board applied the language found in K.S.A. 1992 Supp. 44-567(a)(2) to find that an equitable and reasonable apportionment of liability for the amount of claimant's ultimate disability and award would be an equal division of one-half each for the respondent and the Fund.

The question becomes whether the provisions of K.S.A. 1992 Supp. 44-567(a)(2) can be employed in repetitive use or cumulative trauma cases where a single accident date is found pursuant to the bright line rule first announced in Berry. The Appeals Board has treated the Berry rule to mean that a series of mini-traumas will be assigned a single accident date for computation purposes. It affords a practical and easily applied solution

to the myriad of problems and issues that result from repetitive use conditions which are "neither fish nor fowl." Berry at 227. This was obviously a consideration for the Court in Berry where it said: "This offers simplicity and establishes uniformity in the process in dealing with carpel tunnel syndrome cases. It also eliminates the problem of sorting out a scheduled injury from an injury which has caused permanent partial general disability."

In its March 31, 1995, Order in this case the Appeals Board said:

> "Accepting that the date of accident is deemed to be the last date worked, it would be easy to create a bright line rule in all repetitive trauma cases where the ultimate disability would always be found to have probably or most likely not have occurred but for the pre-existing physical impairment such that the Fund would be one-hundred percent (100%) liable in all repetitive trauma cases. Although the creation of such a bright line rule could be justified and certainly would be easy to apply, the Appeals Board believes that it ignores the factual nuances that regularly appear in these cases. For example, in this case claimant had an onset of symptoms in her left upper extremity as a result of a single traumatic event. Claimant would not have been considered a handicapped employee prior to that injury. Likewise, there was a single traumatic event causing injury to the right upper extremity. In between these injuries and thereafter, claimant suffered aggravation as a result of mini-traumas. It is these mini-traumas from which much, if not all, of claimant's disability results. . . . The Appeals Board agrees that there should be some apportionment of liability between the respondent and the Kansas Workers Compensation Fund. Because a reasonable apportionment cannot be found from the medical testimony, some other method must be employed."

Wherefore, the Appeals Board attempted to apply an "equitable and reasonable" method of apportionment as contemplated by K.S.A. 1992 Supp. 44-567(a)(2).

We interpret the "instructions" from the Court of Appeals as seeking specific findings to two questions. First, whether the Appeals Board was making a "but for" finding or an apportionment finding with respect to causation of claimant's condition. Secondly, the Court of Appeals seeks an answer to the question of whether claimant suffered one injury or two. The Memorandum Opinion states:

> "The Board's order is confusing. It adopts the finding of the ALJ that Diaz has a general bodily injury, not two separate injuries. If Diaz has a general bodily injury and not two separate injuries, K.S.A. 44-567 is not applicable."

Both the Administrative Law Judge and the Appeals Board identified two separate traumatic injuries, one to claimant's left upper extremities and the other to her right, in addition to the series of mini-traumas each and every working day beginning with the September 3, 1991 injury to her left arm, continuing to the March 13 or 16, 1992 injury to her right arm and continuing thereafter through July 30, 1992 when she was taken off work for surgery. Thus, there was a finding of multiple accidents and injuries but they all were treated as one accident following the "bright line rule" announced in Berry.

Neither Berry nor Condon addressed the issue of Fund liability. The Appeals Board interprets the Court's Memorandum Opinion in this case to be instructing the Board that K.S.A. 1992 Supp. 44-567 is inapplicable to all claims involving one accident. If so, finding a series of mini-traumas constitute a single date of accidental injury is more than a legal fiction to be employed to facilitate the computation of awards. The Court of Appeals appears to have intended their bright line rule announced in Berry to simplify and facilitate the assessment of all liability, not just as between respondents and/or insurance carriers, but also as between respondents and the Fund. The Board understands the Court's instruction to be that K.S.A. 1992 Supp. 44-567 would not be applicable to this claim if claimant suffered one injury because she would not have a preexisting condition whereby she could be considered a handicapped employee within the meaning of K.S.A. 44-566(b) (Ensley). Therefore the Fund would have no liability for the award in this case if only one accident date were found to have occurred.

The Appeals Board found claimant suffered three separate mechanisms of injury, a single traumatic injury to her left arm on September 3, 1991; a single traumatic injury to her right arm on March 16, 1992; and a series of accidents to both upper extremities beginning September 3, 1991 and continuing each and every working day through July 30, 1992. However, because both upper extremities were simultaneously aggravated, these separate events were treated as one accident and as an injury to the body as a whole. *See* Murphy v. IBP, Inc., 240 Kan. 141, 727 P.2d 468 (1986).

The Appeals Board has previously held that there can be Fund liability in repetitive trauma cases. *See* Walls v. Rubbermaid, Inc., Docket No. 184,221 (October 1996). To be relieved of liability, respondent must first prove it had knowledge of a preexisting impairment which constituted a handicap. Respondent contends claimant's left upper extremity was injured on September 3, 1991 and that injury caused or contributed to claimant's subsequent injury on her right. However, respondent has not established the nature and extent of claimant's condition as of September 3, 1991. Clearly, the evidence is that both claimant's right **and left** upper extremities were aggravated after September 3, 1991. The Board found the record established that claimant's injury constituted a handicap as of September 3, 1991 such that the subsequent aggravations could be apportioned against the Fund. However, that apportionment was impossible to quantify based solely upon the medical opinions in evidence. The record contained opinions concerning claimant's ultimate impairment after those aggravations. We did not consider this to be a "but for" case because of the subsequent, simultaneous aggravations to both the left and the right upper extremities. Also, although claimant was considered to be a handicapped worker within the meaning of the statute for purposes of finding Fund liability, the Board did not consider the record to have established that claimant had a permanent functional impairment in her left upper extremity as of September 3, 1991. The medical testimony did not support a finding that claimant's left carpal tunnel syndrome for which she underwent surgery on July 31, 1992, was caused by the single traumatic event on September 3, 1991. The Board found claimant suffered each and every day aggravations thereafter until she ultimately was forced to leave work for the surgery. Thus, although we found one date of accident and one injury were established for purpose of awarding a general body disability, we nevertheless determined a portion of liability should be assessed against the Fund. However, in its Memorandum Opinion the Court of Apeals eliminates the option of finding both one accident and Fund liability. The Court found:

> "The findings of the Board are inconsistent with its order. If the Board holds that there is one injury, K.S.A. 44-567 is not applicable. If the Board holds there are two injuries, the Board must give an explanation of how it apportioned the percentage of loss for each injury."

The Court of Appeals, in its Memorandum Opinion, quotes portions of the testimony given by Dr. Ernest R. Schlachter and by Dr. Nick R. Wheeler pertinent to the issue of Fund liability. Dr. Schlachter opines that claimant would not have suffered permanent impairment of function in her right upper extremity but for the preexisting permanent impairment in her left upper extremity. Dr. Wheeler was unwilling to attribute such a cause-and-effect relationship between the injuries in the two upper extremities. Although he conceded the risk of injuring an uninjured arm increases if someone is favoring an injured extremity, he seemed to consider it just as likely that claimant's right arm injury could have occurred with a normal left arm. However, neither Dr. Schlachter nor Dr. Wheeler attributed their impairment ratings for either upper extremity to injuries caused by a single traumatic event. Furthermore, neither Dr. Schlachter nor Dr. Wheeler specifically addressed the relationship of claimant's single traumatic injuries to her left and right arms to her repetitive trauma or overuse injuries. Likewise, they did not address the relationship of the separate traumatic and overuse injuries events to claimant's ultimate impairment.

The Appeals Board is unable to find from the expert medical testimony, or otherwise, testimony which isolates specific impairments for each of the three separate mechanisms of injury. Accordingly, even if we were to treat this claim as separate accidents, we would be unable to determine an appropriate apportionment of liability for the award without resorting to some "equitable and reasonable" basis based upon the record as a whole.

Nevertheless, since we continue to view this claim as compensable as a general body disability and one injury, K.S.A. 1992 Supp. 44-567 is not applicable and the Fund therefore has no liability for the award.

AWARD

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Award of Administrative Law Judge Shannon S. Krysl dated January 25, 1994, and the Appeals Board Order of March 31, 1995, should be, and are hereby reversed insofar as they apportion any liability for the award against the Kansas Workers Compensation Fund.

IT IS SO ORDERED.

Dated this ____ day of April 1997.

BOARD MEMBER

BOARD MEMBER

BOARD MEMBER

c: James B. Zongker, Wichita, KS
Terry J. Torline, Wichita, KS
Michael D. Streit, Wichita, KS
Jon L. Frobish, Administrative Law Judge
Philip S. Harness, Director